No. 76-981

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

CPC INTERNATIONAL INC., ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. This case involves standards of performance for controlling the discharge of pollutants by new sources under Section 306 of the Federal Water Pollution Control Act Amendments of 1972 ("the Act"), 86 Stat. 854, 33 U.S.C. (Supp. V) 1316. Petitioners challenge the new source standards promulgated by the Environmental Protection Agency ("EPA" or "the agency") for the corn wet milling industry, one of the six subcategories recognized by EPA's regulations establishing effluent limitations for the grain processing point source category (Pet. App. 1c).

The court of appeals initially held that the particular new source standards involved were not supported by sufficient evidence in the record (*CPC International Inc.* v. *Train*, 515 F. 2d 1032 (C.A. 8)) ("*CPC I*") and remanded for further

proceedings. EPA conducted further proceedings which resulted in readoption of the original standards. In the decision challenged here, the court of appeals affirmed these standards except with respect to the limitation level for total suspended solids. As to that pollutant, the court ruled that the agency should either adopt a level the court held to be supported by the present record, or reopen the record to develop evidence supporting a lower level (Pet. App. A). The agency adopted the level suggested by the court (Pet. App. D).

2. The principal issue tendered by petitioners—whether new source standards must provide a variance procedure—has been resolved by this Court's decision in *E.I. duPont de Nemours & Co.* v. *Train*, No. 75-978, decided Feburary 23, 1977. The Court there held that Section 306 does not require variances for individual plants unable to comply with the new source standards.

Petitioners nevertheless contend that the case should be remanded to the court of appeals for reconsideration of this issue because they perceive a conflict between the court of appeals' supposed reliance on permits with terms to remedy the problem of "excursions"[1] and the subsequent holding in the *duPont* cases that no variance provision for new source standards is required (Pet. 10).

The conclusion of the court of appeals that the agency had acted properly in not providing for excursions in these new source standards, however, was actually based

[1]"Excursions" are outputs of pollutants that on several days of the year exceed the predictable performance that accounts for 99 percent of the maximum otherwise expected during a plant's operating year (Pet. App. 13a-14a).

on an examination of the particular administrative record in this case, which revealed that as a factual matter excursions for new plants in this industry may be avoided by applying available waste treatment technology (Pet. App. 14a).[2] There is no reason why the court of appeals should reconsider its reasoning on this point in light of the *duPont* decision.

3. Whether EPA should make provision for excursions in new source standards under Section 306 depends upon the technological circumstances found in each particular industry or subcategory of point sources. In the instant case the court of appeals did not purport to establish a uniform rule that excursions need not be provided in new source standards. Rather, the court carefully limited its consideration to the particular administrative record before it and correctly concluded that in this particular case the Administrator had not acted arbitrarily or capriciously in his consideration of variability or excursions

[2]The court also indicated that, even if on a rare occasion the standards are exceeded due to "inadvertent error or Act of God," the agency has established a policy of informally working with the plant involved "to remedy the problem" rather than bringing an immediate enforcement action (Pet. App. 14a-15a). The court additionally noted that the agency had established a policy of revising a permit for a new source if the permit conditions "prove to be unreasonable or cannot be met for cause beyond the control of the permittee" (Pet. App. 15a). Contrary to the petitioners' implication, this latter reference to permit conditions was clearly not the sole or primary basis of the court's holding on this point. In any event, we believe there is no inconsistency at all between a flexible policy of revising permit conditions under certain circumstances and the holding in the *duPont* cases that a variance provision is not *required* under Section 306 of the Act.

(Pet. App. 13a-15a).[3] Similarly, in *American Petroleum Institute* v. *Environmental Protection Agency*, 540 F. 2d 1023 (C.A. 10), relied on by the petitioners (Pet. 12), the court of appeals made it clear that the question of excursions turns on the particular administrative record in each case (540 F. 2d at 1036):

> The Fourth Circuit [in *FMC Corp.* v. *Train*, 539 F. 2d 973] was considering a factual situation different from that before us. On the present record we are unconvinced that the refineries should be granted any specific number of days during a year when they may make excess discharges.

Since the question whether an allowance for excursions should be contained in new source standards must be decided on a category-by-category basis, there is, in fact, no conflict among the courts of appeals.

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[3]Since no existing corn wet milling plant is performing adequately in terms of the expected performance of a *new* plant, an accurate variability factor for new plants cannot be statistically calculated. Such a factor represents the relationship between the average short-term and the average long-term performance of a treatment system, and takes into account expected fluctuations. *CPC I, supra*, 515 F. 2d at 1046-1047, n. 30. Thus, since an allowable number of excursions must be derived from such a statistically calculated variability factor, at the present time it would not even be possible to determine a meaningful number of allowable excursions for new plants in this particular industry.

As the Administrator explained in his "Decision Not to Revise New Sources Performance Standards" (Pet. App. 3d-4d):

> There obviously is no statistical data available with respect to treatment systems for new sources. In this respect, variability data for existing sources would not be entirely representative of and comparable with effluent variability to be expected for new sources inasmuch as no present corn wet milling plant is now completely "exemplary" in terms of the established new source performance standard.

4. Petitioners' final contention is that the court of appeals erred in finding that the Administrator had properly considered the effects of varying product mix[4] in establishing the new source standards for the corn wet milling subcategory (Pet. 13-14).

First, the Administrator took into account the various processes employed in the grain mills category of point sources by dividing the category into six distinct subcategories, one of which was corn wet milling (Pet. App. 1c). With regard to the corn wet milling subcategory itself, the Administrator found (Pet. App. 2d-3d):

> EPA has acknowledged, and continues to acknowledge, that product mix variations may indeed have some influence on raw waste characteristics of corn wet milling wastes. However, no reliable and meaningful relationship between product mix and waste flow characteristics has been demonstrated to date either by EPA or industry. * * *
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> The industry has yet to provide data or information to responsibly disprove the considered conclusions of EPA. More importantly, evidence supports [sic] that any variations in product mix as affecting raw waste load do not preclude compliance of existing or new sources with present effluent guidelines and new source performance standards. * * *

After carefully examining the voluminous administrative record, the court of appeals correctly determined that the

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[4]The term "product mix" refers to the fact that corn wet milling plants typically process raw corn into such different products as corn syrups, corn sweeteners, and modified starches in varying amounts.

Administrator's conclusions as to the product mix effects in the corn wet milling subcategory were not arbitrary or capricious. There is no reason for this Court to re-examine this determination.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

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[5]Petitioners contend that a plant manufacturing modified starches should not be subjected to the requirements of a plant manufacturing syrup or sweeteners. But the court of appeals found (Pet. App. 12a) that—

> [t]he record also discloses that the EPA did take into consideration the increased wasteloads generated by the production of modified starches. The EPA compiled data of actual performance results from newer existing mills that produce both conventional corn syrups and modified starches and also the projections for new plants, submitted by the industry, in order to determine the wastewater flow and influent levels of the model plant. * * *
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> Furthermore, the data relied upon by the petitioners * * * must be contrasted with other data showing no appreciable influent increase.